



Date: July 8, 1998

Case No.: **97 INA 540**

In the Matter of:

DIET TO GO,
Employer,

on behalf of

GARDENIA INDIRA GUILLEN,
Alien

Appearance: Jose Pertierra, Esq., of Washington, D. C.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that DIET TO GO ("Employer"), filed on behalf of GARDENIA INDIRA GUILLEN ("Alien"), under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.¹

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor. 20 CFR § 656.27(c).

and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On September 16, 1996, the Employer filed for alien labor certification on behalf of the Alien to fill the position of "Secretary/Bilingual." The job duties were described as follows:

Compose and type correspondence in English and [S]panish; answer telephone and give information to callers or route to appropriate person; greet visitors, ascertain nature of business, and reply to inquiries, prepare and send out newsletters, promotional materials and other publications in English and Spanish to persons on mailing list; type bulletins and memoranda in English and Spanish directed to employees.

AF 31. The position offered was classified as "Secretary" under DOT Occupational Code No. 201.362-030.² The wage offered was \$12.41 per hour from 8:30 AM to 5:00 PM, for a forty hour week. The education required was completion of high school, and two years' experience in the Job Offered.³ The Other Special Requirements were,

This is a skilled labor position. Character references and verification of experience are required; must be fluent in both English and Spanish.

Id., Item 15. Although three U. S. workers applied for the job, the Employer did not hire any of

²**201.362-030 SECRETARY (clerical) alternate titles: secretarial stenographer.** Schedules appointments, gives information to callers, takes dictation, and otherwise relieves officials of clerical work and minor administrative and business detail: Reads and routes incoming mail. Locates and attaches appropriate file to correspondence to be answered by employer. Takes dictation in shorthand or by machine [STENOTYPE OPERATOR (clerical) 202.362-022] and transcribes notes on typewriter, or transcribes from voice recordings [TRANSCRIBING -MACHINE OPERATOR (clerical) 203.582-058]. Composes and types routine correspondence. Files correspondence and other records. Answers telephone and gives information to callers or routes call to appropriate official and places outgoing calls. Schedules appointments for employer. Greets visitors, ascertains nature of business, and conducts visitors to employer or appropriate person. May not take dictation. May arrange travel schedule and reservations. May compile and type statistical reports. May oversee clerical workers. May keep personnel records [PERSONNEL CLERK (clerical) 209.362-026]. May record minutes of staff meetings. May make copies of correspondence or other printed matter, using copying or duplication machine. May prepare outgoing mail, using postage-metering machine. May prepare notes, correspondence, and reports, using work processor or computer terminal. *GOE: 07.01.03 STRENGTH: S GED: R4 M3 L4 SVP: 6 DLU:89*

³The Employer wrote across the boxes at Item 14, "Must be literate."

them. AF 20, 24, 28-29.

First Notice of Findings. The CO's March 11, 1997, Notice of Findings ("NOF") found that the Employer failed to establish that it had rejected the U. S. workers for reasons that were lawful and job-related under 20 CFR §§ 656.20(c)(8) and 656.21(b)(6).

First Rebuttal. March 18, 1997, Employer filed a Rebuttal, in which it said that it now was filing the resumes of two U. S. workers which the First NOF had noted were missing from the record.

Second Notice of Findings. On May 8, 1997, the NOF denied certification subject to Employer's rebuttal, finding that the Employer had rejected Margaret Carrasco, who was qualified for the job offered, and that the job description in Form ETA 750 A contained a foreign language requirement, the business necessity of which was not proven. (1) Because Ms Carrasco appeared qualified, the CO found that the Employer had failed to present persuasive evidence that this job candidate was unable to perform the core job duties described on Form ETA 750 A at Items 113 and 15, citing 20 CFR §§ 656.20(c)(8) and 656.21(b)(6).⁴ (2) As the requirement that the worker must be fluent in Spanish was a foreign language requirement that violated 20 CFR §§ 656.21(b)(2) and 656.21(b)(5), the CO explained that the Employer could delete this hiring criterion, demonstrate it to be common to the occupation, or prove its business necessity. The AF 07-08. CO then specified the evidence required for the rebuttal of these findings.

Second Rebuttal. On June 6, 1997, the Employer filed a Second Rebuttal to which it attached the statement of business necessity that it had submitted to the State Employment Security Agency ("SESA"). AF 09. (1) The Employer first argued that Ms. Carrasco's lack of qualifications was the reason it had rejected her for this position, explaining that her experience that exceeded two years as an Office Manager and as an Administrative Assistant was an insufficient background to perform the job duties of a Secretary. (2) Employer then pointed out that it had already demonstrated the business necessity of the foreign language and there was no change in either the facts or the evidence that justified the contrary finding in the Second NOF. Referring to AF 09, the Employer said,

A reading of the statement would show that the basic reason for the requirement is the efficiency and productivity of the workers and not the relations with clients, as is implied in your Notice of Findings.

The Employer said its business necessity was based on its assertion that more than fifty percent of its workers as "Spanish speaking" and that seven out of twenty-eight of its "Hispanic workers" are

⁴Examination of the record indicates that the Employer transmitted the resume of Ms. Vandervliet, but the resume of Ms. Carrasco was not attached to this rebuttal. See AF 13-15. As the CO did refer to her resume in AF 11, the Panel assumed that the resume was duly filed with the First Rebuttal, but was omitted from the Appellate File transmitted for BALCA review.

fluent in English and Spanish. AF 07-08. No data or other documentation was offered to support either of the foreign language requirement.

Final Determination. After considering Employer's rebuttal documentation with the remainder of the record, the CO denied certification by the Final Determination of July 8, 1997. AF 02-05. The CO accepted the rebuttal as satisfying the Second NOF as to its rejection of the U. S. job applicants. Notwithstanding the directions set out in the Second NOF, however, the Employer's Second NOF rebuttal did not submit the documentary proof that the CO identified at AF 12, nor did Employer indicate that it failed to grasp the nature or content of the documentation and other proof that the CO directed it to file in the NOF instructions. Moreover, the Employer did not at any point offer to alter the foreign language job requirement that the CO found unlawfully restrictive under the Act and regulations to the normal level of qualifications for this position.

Repeating the description of the rebuttal evidence required by the Second NOF, the CO explained that denial of certification was based on the Employer's failure to provide the information necessary to establish the business necessity of its restrictive foreign language job requirement. The Employer's description of its business necessity was not sufficient to justify the foreign language requirement as it related to such job duties as sending out newsletters, promotional materials and other publications in English and Spanish, and the typing of bulletins and Employee memoranda in English and Spanish, the CO concluded because of the Employer's failure to provide the requisite documentation to establish the facts on which its arguments relied. As a result, the CO said, Employer did not establish either that its foreign language requirement is customary or rests on proven business necessity. AF 04-05.

Appeal. The Employer appealed to BALCA on August 6, 1997, and on October 11, 1997, filed its Appellate Brief.

Discussion

The issue is whether the CO correctly found the Employer's description of the position offered to require fluency in a foreign language requirement that was prohibited as restrictive within the meaning of the Act and regulations. While it may adopt any qualifications it may fancy for the workers it hires in its business, an employer must comply with the Act and regulations when it seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. This is particularly the case where, as in this application, the employer's hiring criterion conflicts with the explicit prohibition of 20 CFR 656.21(b)(2)(C), a regulation adopted to implement the relief granted by the Act, which provides that the job offer shall not include the capacity to communicate in a language other than English as a hiring criterion unless that requirement is adequately documented as arising from business necessity.

As the CO's decision was based on the Employer's failure to sustain its burden of proof, it is appropriate to explain that labor certification is a privilege that the Act expressly confers by

giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361)⁵ to implement the burden of proof that Congress placed on certification applicants:

"Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ."

As the Employer seeks certification for the Alien pursuant to an exception to the Act's broad limits on immigration into the United States, the award of alien labor certification is strictly construed under the well-established common law principle that, "Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption." 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896). For these reasons, in establishing its entitlement to alien labor certification, the Employer must sustain the burden of proving all of the issues arising under its application for relief. As Employer's foreign language job requirement was restrictive on its face, the regulations required the Employer to show that the foreign language requirement either was customary and normal or that it was a business necessity.⁶

The Board held in **Information Industries**, 88 INA 082 (Feb. 9, 1989)(*en banc*), that proof of business necessity under this subsection requires the employer to establish that (1) the foreign language requirement bears a reasonable relationship to the occupation in the context of its business and (2) that the use of the foreign language is essential to performing in a reasonable manner the job duties described in its application for alien labor certification. In proving the first prong of this test, it is helpful to show the volume of the employer's business that involves foreign language speaking customers or its business usage of that language. This may be demonstrated with proof as to (1) the customers, co-workers, or contractors who speak the foreign language and (2) the percentage of the employer's business that involves that language. In the context of the instant case, the second prong requires factual and persuasive evidence that the employee

⁵The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

⁶An employer's unsupported assertion that the foreign language job requirement is a business necessity is insufficient proof. **Watkins-Johnson Company**, 93 INA 544 (April 10, 1993). Moreover, this Employer failed to provide any evidence to substantiate its claims that the foreign language requirement it sought to fill by certification of this alien was customary and normal for this position.

communicates or reads in the foreign language while performing the job duties.⁷

The CO's reasoning in the instant case was reviewed with the holdings in precedents cited above. The Employer did not persuade the CO because its argument as to its business necessity for a Secretary fluent in the Spanish language turned entirely on the proof of the facts that the CO described in the NOF. After examining the Appellate File the Panel agrees that the Employer's rebuttal evidence failed to meet its burden of establishing business necessity because the Employer's proof is vague, incomplete, and limited to Employer's bare assertions, which it failed to support with relevant objective facts. **Analysts International Corporation**, 90 INA 387 (Jul. 30, 1991). Any written statements of the Employer could be accepted as documentation, if they were reasonably specific and indicated their sources or bases. The CO is not required to accept as credible or true the written statements Employer supplied in lieu of independent documentation, but must give Employer's statements the weight they rationally deserve. The bare assertions this Employer offered without supporting evidence were insufficient to carry its burden of proof. **Gencorp**, 87 INA 659 (Jan. 13, 1988)(*en banc*).⁸

Recognizing that the evidence it filed in response to the Second NOF was insufficient to sustain the burden of proof, the Employer belatedly complied with the CO's directions by appending to its Appellate Brief the evidence that it was to have filed with its Second Rebuttal. This Panel is constrained by the provision of 20 CFR § 656.27(c) that the Board "shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was made, the request for review, and any Statements of position or legal briefs submitted." As to the evidence that the Employer finally filed with its Appellate Brief, the Panel further notes that 20 CFR § 656.24(b)(4) further provides that the request for administrative-judicial review "shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based." It is well established that evidence which was first submitted with the employer's Appellate Brief cannot be considered on appeal, if it is not in the record on which the CO's denial was based. **O'Malley Glass & Millwork Co.**, 88 INA 049 (Mar.

⁷Business necessity is not proven under the first prong where the percentage of customers who speak the foreign language is small. **Felician College**, 87 INA 553 (May 12, 1989)(*en banc*). That share of employer's affected business must equal a percentage that is significant. **Raul Garcia, M.D.**, 89 INA 211 (Feb. 4, 1991). In **Washington International Consulting Group**, 87 INA 625 (Jun. 3, 1988), however, the Board held that a foreign language was not a necessity where only twenty-three per cent of the client base was affected by the employer's foreign language requirement. Both prongs of the **Information Industries** test must be met, however. Simply proving that a significant percentage of the employer's customers speaks the foreign language is not sufficient to establish business necessity under this subsection, unless the employer also proves the existence of a relationship between the customers' use of that foreign language and the job to be performed. In **Coker's Pedigree Seed Co.**, 88 INA 048 (Apr. 19, 1989)(*en banc*), and in **Hidalgo Truck Parts, Inc.**, *supra*, business necessity was established by evidence of significant customer dependence on Spanish-speaking employees. In **Splashware Company**, 90 INA 038 (Nov. 26, 1990), where the employer did show that a significant percentage of its clientele spoke the foreign language, the Board found that business necessity was not proven because no relationship was proven between the customers' use of the foreign language and the job to be performed.

⁸To the same effect see **Our Lady of Guadalupe School**, 88 INA 313 (Jun. 2, 1989); **Inter-World Immigration Service**, 88 INA 490 (Sep. 1, 1989), and **Tri-P's Corp.**, 88 INA 686 (Feb. 17, 1989).

13, 1989).⁹

Summary. As discussed above, in the Second NOF the CO provided sufficient notice of the reasons for the denial of certification, and told the Employer how to cure the defects found in the application. Employer offered to rebut the CO's findings by a narrative statement that was not supported by the documentation specified in the Second NOF as to either of the restrictive requirements. In spite of the detailed directions set out in the Second NOF, Employer's rebuttal did not submit the documentary proof that the CO requested, and it did not at any point offer to alter or reduce its foreign language requirement for this position, which the CO identified as unlawfully restrictive under the Act and regulations. As the evidence of record supports the CO's denial of labor certification under the Act and regulations, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

⁹This is consistent with the holding that evidence first submitted with the request for review will not be considered by the Board. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.